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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 1063

CLARENCE G. KUNSMAN,

Appellant,

vs.

MAX FACTOR & CO., A CORPORATION, AND SALES BUILDERS, INC., A CORPORATION,

Appellees.

STATEMENT OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Pursuant to the provisions of Section 1, of Rule 12, of the Revised Rules of the Supreme Court of the United States, Appellant respectfully submits herewith this statement of the jurisdiction of said Supreme Court of the United States in the above entitled cause, and respectfully shows:

I.

The Statutory Provisions Which Appellant Contends Sustain the Jurisdiction of This Court to Review the Judgment in the Within Cause Upon Appeal.

That 45 Stats. 54, Chapter 14, Section 1, enacted January 31, 1928 (U. S. C. A., Title 28, Section 861a), provides that

the writ of error is abolished and that relief theretofore obtainable by writ of error shall thereafter be obtainable by appeal.

That 45 Stats. 54, Chapter 14, Section 2, as amended April 26, 1928, by 45 Stats. 466, Chapter 440 (U. S. C. A., Title 28, Section 861b), provides that the statutes regulating the right to a writ of error shall be applicable to the appeal which the statute hereinabove referred to, substitutes for the writ of error.

That Rule 46, paragraph 2, of the Rules of the United States Supreme Court provides that an appeal may be allowed to this Court where the case is one permitting an appeal by writ of error under the legislation in force when the act abolishing the writ of error was adopted.

That under Judicial Code, Section 237(a), as amended to February 13, 1925, by 43 Stats. p. 937, Chapter 229, Section 1 (U. S. C. A., Title 28, Section 344(a)), said act being the legislation in force governing the use of the writ of error at the time said writ of error was abolished on January 31, 1928, a writ of error was available for review of a final judgment or decree in a suit in the highest court of the State in which a decision in the suit could be had, where there is drawn in question the validity of the statute of any State on the ground that it is repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity, and that in such case the writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States and the Supreme Court of the United States may reverse, modify or affirm the judgment or decree of such State court and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

II.

The Statute of the State of California, the Validity of Which is Involved in This Appeal.

That your petitioner respectfully shows that the instant case is one in which, under the legislation hereinabove referred to, a review could be had in the Supreme Court of the United States as a matter of right, in that there is drawn in question the validity of Section 1½ of a statute of the State of California known as the Fair Trade Act (Stats. of California, 1931, Chapter 278, Page 583, as amended by the addition of Section 1½ thereto, Stats. of California, 1933, Chapter 260, Page 793), upon the ground that said statute is repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States. The content of said act, together with said amendment, is herewith set out verbatim:

> "An act to protect trademark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trademark, brand or name.
>
> (Approved May 8, 1931, Stats. 1931, p. 583. In effect August 14, 1931.)
>
> 1. Certain sale contracts declared lawful.
> 2. Exception.
> 3. Definition.
> 4. Constitutionality.
> 5. Short title.
>
> "1. Certain Sale Contracts Declared Lawful.—No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears the trademark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any

law of the state of California by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

"2. Exception.—This act shall not apply to any contract or agreement, between producers or between wholesalers or between retailers as to sale or resale prices.

"3. Definitions.—The following terms, as used in this act, are hereby defined as follows:

'Producer' means grower, maker, baker, manufacturer or publisher.

'Commodity' means any subject of commerce.

"4. Constitutionality.—If any provision of this act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

"5. Short title.—This act may be known and cited as the 'Fair Trade Act'."

Section 1½ of said Fair Trade Act, being the provision whose constitutionality is here involved, was added in 1933 (Stats. 1933, Chapter 260, page 793) and provides as follows:

> "Sales below contract price.—Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

III.

The Case is Within the Jurisdictional Provisions on Which Appellant Relies.

The nature of the above entitled cause in the trial court, was an action for an injunction instituted by the appellees under Section 1½ of said Fair Trade Act, to restrain appellant, a retail drug merchant, from knowingly selling certain trademarked commodities manufactured by appellee, Max Factor & Co., at a price less than the price fixed by appellees for similar commodities, in contracts entered into between appellees and third persons. Appellant was not a party to such contracts. Appellant raised the objection that said Section 1½ of the Fair Trade Act was unconstitutional, by filing a general demurrer to appellees' complaint. A hearing on said demurrer was had and the trial court thereupon made its order sustaining appellant's demurrer, without leave to amend, on the ground that Section 1½ of the Fair Trade Act violated the Fourteenth Amendment to the Constitution of the United States. Judgment on said order was entered by the trial court on February 5, 1934. Appellees thereupon appealed from said judgment, to the Supreme Court of the State of California, and on

February 27, 1936, said Supreme Court of the State of California rendered judgment reversing the judgment entered by the trial court on the order sustaining appellant's demurrer without leave to amend. Appellant thereupon filed with said Supreme Court of the State of California, a petition for rehearing of said cause. Said petition for rehearing was denied by said Supreme Court of the State of California on the 26th day of March, 1936, at which time said court modified its opinion by ordering the trial court to enter final judgment for the appellees by reason of appellant's election to stand upon his demurrer. The Supreme Court of the State of California, in reversing said judgment of the trial court, as aforesaid, ruled that Section 1½ of the Fair Trade Act was constitutional, and that it did not deprive appellant of his liberty or property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The opinions of the Supreme Court of California are printed as an appendix to the Statement as to jurisdiction in the case of *The Pep Boys, etc.* v. *Pyroil Sales Co. Inc.*, No. 1024, October Term, 1935, and in the interest of brevity are not repeated here. That the Supreme Court of the State of California is the court of last resort in all causes heard in the State of California, and that said court has heard and rendered its final judgment in the within cause.

IV.

The Federal Question Involved is a Substantial One.

The Federal question involved herein is a substantial one and is neither frivolous nor moot. Section 1½ of the Fair Trade Act which appellant alleges to be unconstitutional, vitally affects the liberty and property rights of almost every resident of the state, including manufacturers, wholesalers, distributors, retailers and the consumer public.

It raises the question of the right of a person to sell his own property at prices of his own choosing.

The New York Court of Appeals, in *Doubleday, Doran & Co., Inc.*, v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272, 199 N. E. 409, decided January 7, 1936, declared unconstitutional under the Federal constitution, a statute of the State of New York which is virtually identical with the statute involved in the present case. The conflict of decisions on this important Federal question by the highest courts of these two states has tended to create uncertainty and confusion among business men and the consumer public throughout the nation, and will tend to give rise to a multiplicity of suits unless the Federal question involved is decided by the highest court of the land.

V.

The Cases Which Appellant Believes Sustain the Jurisdiction of This Court.

A. The United States Supreme Court has jurisdiction of a cause wherein a real and substantial Federal question is involved.

U. S. Fidelity & Guaranty Co. v. *Oklahoma*, 250 U. S. 111, 39 Sup. Ct. 399, 63 L. Ed. 876;

Zucht v. *King*, 260 U. S. 174, 43 Sup. Ct. 24, 67 L. Ed. 194;

Milheim v. *Moffat Tunnel Imp. Dist.*, 262 U. S. 710, 43 Sup. Ct. 694, 67 L. Ed. 1194.

B. Where the highest court of a State affirms or denies the validity of a judgment of an inferior court over which it exercises appellate authority, this Court has jurisdiction to review such decision, if it involves a Federal question.

Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. *Rock*, 279 U. S. 410, 49 Sup. Ct. 363, 73 L. Ed. 766;

Williams v. *Bruffy*, 102 U. S. 248, 26 L. Ed. 135.

C. A judgment is final if it disposes of the whole case on the merits, directs what judgment should be entered, and leaves nothing to the judicial discretion of the trial court.

Rio Grande Western Ry. Co. v. *Stringham,* 239 U. S. 44, 36 Sup. Ct. 5, 60 L. Ed. 136;

Board of Commissioners, etc., v. *Lucas,* 93 U. S. 108, 23 L. Ed. 822.

Respectfully submitted,

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(7834-C)